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NO. 88.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1933.

UNITED STATES OF AMERICA, Petitioner,

vs.

HARRY MURDOCK, Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

SUPPLEMENTAL BRIEF FOR THE RESPONDENT.

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PETITION FOR LEAVE TO FILE.

Now comes Harry Murdock, above-named respondent, by his attorneys, and respectfully petitions this Honorable Court for permission to file the following supplemental brief instanter.

This case is set for oral argument before this Honorable Court on November 6, 1933. Rule 27 of the revised rules of this court provides that the brief for appellant or petitioner shall be filed with the clerk at least three weeks before the case is called for hearing, and that counsel for

appellee or respondent shall file a brief at least one week before the case is called for hearing. This rule required petitioner's brief to be filed not later than October 16th. No brief was filed by petitioner on or before that date, but on October 23rd the undersigned counsel, representing respondent, received, from the Solicitor General of the United States, a proof of a brief with a letter accompanying same, signed by the Solicitor General, in which he said that "final print is expected in a day or two and copies will then be sent to you." The letter of the Solicitor General bears date of October 20, 1933.

When no brief for petitioner was filed by October 16th the undersigned counsel for respondent prepared a brief for respondent and on October 21, 1933, mailed forty printed copies of same to the clerk of this Honorable Court, and two printed copies to the Solicitor General.

Counsel representing respondent deem it necessary to reply to certain statements contained in the brief of the petitioner, and the attached supplemental brief is limited to that single purpose.

It is for this reason that permission is respectfully asked to file this supplemental brief for respondent.

Respectfully submitted,

EDMUND BURKE,
Springfield, Illinois,
HAROLD J. BANDY,
Granite City, Illinois,
Attorneys for Respondent.

ARGUMENT.

Counsel for petitioner say, on page 6 of their brief, that:

> "The narrow question here presented is whether the phrase, 'willfully fails to * * * supply such information,' as used in those statutes, means anything more than an intentional, deliberate refusal, as charged by the District Court (R. 66), or whether bad faith is an essential ingredient of the crime, as held by the Circuit Court of Appeals (R. 90)."

Petitioner's statement of the question presented is inaccurate and misleading. The question presented is whether respondent was entitled to have the jury instructed to consider his asserted "good faith" and "actual belief" in refusing to answer certain questions, in determining whether "his refusal to answer the questions was willful."

The record shows that respondent did not deliberately refuse to answer any question. His refusal was not a summary one that exhibited contempt for the law. Each time that he refused to answer he stated that his answer might incriminate him. The record shows that he believed that the Fifth Amendment excused him from divulging information that might incriminate him in a state court.

The statute makes it an offense for a taxpayer, when summoned before an internal revenue agent and placed under oath, to willfully fail to supply information. Both counts of the indictment charge a WILLFUL failure by respondent to supply requested information.

The term "willfulness" has been defined in many reported cases and many textbooks. In 16 C. J. 79-80 it is said:

> "The term 'willfulness' is vague in its meaning. * * * Generally, when employed in a penal statute, it indicates a bad or corrupt purpose, an evil intent without reasonable grounds to believe that the action is lawful."
>
> "An allegation that a thing is done willfully is equivalent to alleging that it is done knowingly. So it has been held in a number of cases that where one bona fide believes that his act is right, it is not willful."

Am. & Eng. Enc. of Law, V. 30, pp. 528-529.

In the case of Spurr v. U. S., 174 U. S. 728, the defendant was charged with willfully certifying a check of a national bank in which he was employed at a time when the deposit of the person for whom the check was certified was insufficient to pay the check. In this case the Court said:

> "The wrongful intent is the essence of the offense. The defense was that defendant had no actual knowledge that Dobbins and Dazey had not sufficient funds in the bank to meet the check; that, on the contrary, he believed that they had such funds. * * * That he honestly relied on that information and that he had the right to do so. Defendant was entitled to the full benefit of this defense, and in order to secure that, it was vital that the meaning of 'willful violation,' as used in Section 13 of the Act of 1882, should be clearly explained to the jury."

In the Spurr case, as in the present case, counsel representing the defendant requested the Court to instruct the jury upon the meaning of the inclusion of the word "willful" in the statute. This the trial court refused to do. This Honorable Court, in reversing the judgment, said:

> "We think the learned Circuit Judge clearly erred in declining the request of counsel in respect of section 13."

In Potter v. U. S., 155 U. S. 437, in defining "willfulness" in a penal statute, it is said that it implies, on the part of the person charged, "knowledge and purpose to do wrong."

In Felton v. U. S., 96 U. S. 699, at 702, it is said:

> "Doing or omitting to do a thing knowingly and willfully implies not only a knowledge of the thing, but a determination with a bad intention to omit doing it."

In Potter v. U. S., supra, it was also said:

> "As willful wrong is of the essence of the accusation, testimony bearing directly on the question is of vital importance, and error in rejecting it cannot be regarded as other than as material and manifestly prejudicial."

We respectfully submit that if testimony upon a certain phase of a case is so vitally material that rejection of it constitutes "material and manifestly prejudicial" error,

the jury should be instructed upon the law applicable to that evidence.

Respondent's sworn testimony explaining his reasons and purposes for refusing to answer was introduced into the evidence by the prosecution at the trial of this case. Not only did the United States Attorney introduce this evidence, but he did not object to it or move that it be stricken from the record. It is a part of the testimony in this case. It relates directly to the question of whether respondent's refusal was willful. Inasmuch as it was proper and pertinent testimony, respondent was entitled to an instruction upon this phase of the case. In requesting such an instruction respondent did not ask the Court to single out or emphasize that testimony. This instruction merely advised the jury to consider that testimony along with the other evidence in the case and did not in any way intimate to the jury what the verdict should be.

On page 6 of petitioner's brief counsel say: "A similar question was before this Court in Sinclair v. United States, 279 U. S. 263." The question before the Court in the Sinclair case was in no way similar to the question here presented. The statute under which Mr. Sinclair was prosecuted defined the offense as refusal "to answer any question pertinent to the question under inquiry." Willfulness was not made an element of the offense. Mere refusal to answer pertinent questions constituted the entire offense. In the opinion this Honorable Court said: "The gist of the offense is refusal to answer pertinent

questions." In the case here presented the gist of the offense is WILLFUL failure to supply information. What this Court said in the Sinclair opinion cannot, by any stretch of the imagination, be made to apply to the law and the facts involved in this case.

The same may be said of Chapman v. United States, 8 App. D. C. 302, also relied upon by petitioner and quoted from on page 7 of petitioner's brief. In that case the element of willfulness was not involved.

Counsel for petitioner say, on page 8 of their brief, that the District Court summed up the law of this case, and properly and fully charged the jury, by the following part of the charge:

> "Gentlemen of the jury: There is only one question for you to decide, and that is whether or not this defendant willfully refused to give information which the Government sought to secure from him. Now, if he did so refuse, and if you should so find from the evidence, he is guilty."

This instruction did not define willfulness. It left the jury to grope for a definition without any assistance from the Court.

It was because of the total failure of the charge in any way to define the word "willful" or to elucidate to the jury the importance or pertinency of this word in the statute, that respondent requested an instruction that would throw light upon the significance of that word.

The requested instruction faithfully followed the law as laid down by this Honorable Court in the cases of Potter v. U. S. and Felton v. U. S., supra. It should have been given.

We agree completely with the statements of counsel for petitioner wherein they say that a person may not "rely upon the advice of counsel in defiance of a court order," and that "if a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent," and that, "if a party may make himself the judge of whether he shall obey the mandate of a statute and by his own act of disobedience defeat the purpose of the statute, then must an important power of Congress be set at naught and every citizen made a law unto himself." These statements are true in their entirety as abstract propositions, but they do not fit the facts appearing in or the questions presented by this case. The Fifth Amendment is still a vital part of the Constitution; one of the pillars of human liberty. That amendment still protects the citizen from self-incrimination. If a citizen is ignorant of the construction placed or to be placed upon that amendment by this Honorable Court; if he honestly and in good faith claims the protection guaranteed by the amendment in the honest, but ignorant and mistaken, belief that it is broad enough to protect him from incriminating himself under a state law, the fact that he did honestly and in good faith attempt to claim that consti-

tutional protection from answering certain questions should and must be considered in arriving at a proper decision of whether his conduct in so refusing was willful.

Counsel for petitioner contend that the Government was required to show only that respondent refused to answer questions; that the mere showing of this fact instantly established, beyond a reasonable doubt, that respondent's conduct constituted a deliberate, intentional and willful violation of the statute; that proof of his refusal to answer necessarily implies willfulness in the legal sense. On page 8 of petitioner's brief appears this statement:

> "The statutes here under consideration do not make bad faith an element of the crime and the Circuit Court of Appeals was without power to add to the statute."

The effect of adopting the construction of the statute suggested by petitioner would be to emasculate the law and destroy its plain meaning. The effect of this interpretation would be to strike the word "willful" from the act and to hold that Congress did not intend to include the word in the statute, or to make its meaning a vital part of the statute.

The fallacy of this contention is pointed out by this question: Would an indictment under this statute be good if it merely charged "failure to supply information," and omitted to charge "willful failure"? It is elementary that a charge that is so material that it must be pleaded must also be proved. It follows logically that the jury should

be instructed upon any fact that is so important that it must be both pleaded and proved.

On page 8 of their brief, counsel for petitioner also make this statement:

> "Where a statute makes a willful act, or the willful refusal to do an act, a crime, it is only necessary to show that the defendant ran counter to the statutory mandate and that in doing so he acted deliberately and willfully."

This is an admission that it was necessary for the prosecution to show that respondent acted willfully. If this was a necessary and vital fact to be shown, it was a fact upon which the jury should have been instructed. The refusal of the trial court to instruct the jury upon this element of the case deprived respondent of a fair trial and constituted reversible error.

Respectfully submitted,

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